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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

YOLANDA PENNY,

Plaintiff and Appellant,

v.

SAN DIMAS COMMUNITY HOSPITAL,

Defendant and Respondent.

B235088

(Los Angeles County
Super. Ct. No. BC427326)

APPEAL from an order of the Superior Court of Los Angeles County. Abraham Kahn, Judge. Affirmed in part, reversed in part.

Law Office of Joseph Antonelli, Joseph Antonelli, Janelle C. Carney; Law Office of Kevin T. Barnes, Kevin T. Barnes and Gregg Lander for Plaintiff and Appellant.

Reed Smith, Thomas E. Hill and Mara D. Matheke for Defendant and Respondent.

SUMMARY

Yolanda Penny filed a class action complaint alleging wage and hour violations against her employer Prime Healthcare Services—San Dimas LLC (“San Dimas”), the owner of San Dimas Community Hospital. Penny appeals from an order denying class certification. We affirm in part and reverse in part.

BACKGROUND

In February 2010, Penny filed on behalf of herself and all others similarly situated a second amended complaint against San Dimas. Penny worked for San Dimas as a certified nurse assistant from August 14, 2008 to November 6, 2009. She was paid on an hourly basis and worked a 12-hour alternative work schedule (AWS). In April 2011, Penny sought certification of six classes for the class period from July 2008 onwards:

1. Overtime: Penny alleged that San Dimas regularly had AWS employees work in excess of 3/12 shifts but did not pay double time for the excess hours.
 - a. As a subclass, Penny alleged San Dimas did not pay AWS employees a proper premium rate for working over the agreed-upon schedule.
 - b. As a second subclass, Penny alleged San Dimas did not pay a short shift penalty for working less than the agreed upon schedule or overtime for hours in excess of 8 hours a day.
2. “Regular” Rate: Penny alleged San Dimas miscalculated AWS employees “regular” rate of pay by failing to include “nondiscretionary bonuses, charge nurse premium, shift differentials, holiday premium and weekend premiums.”
 - a. As a subclass, Penny alleged San Dimas paid AWS employees less than the regular rate of pay for missed meal or rest period penalties.
3. Failure to Pay “All Wages”: Penny alleged San Dimas did not pay AWS employees all wages due to them for overtime, double overtime, missed meal periods and missed rest breaks.
 - a. As a subclass, Penny alleged San Dimas did not pay AWS employees minimum wage for on call or standby status.

4. Waiting Time: Penny alleged San Dimas did not pay AWS employees who left its employ all wages due upon termination.
5. Missed Meal Periods: Penny alleged San Dimas failed to provide legally compliant meal periods.
 - a. As a subclass, Penny alleged that San Dimas required AWS employees to sign second meal waivers as a condition of employment.
 - b. As a second subclass, Penny alleged San Dimas had AWS employees who signed second meal waivers and worked more than 12 hours in a shift.
 - c. As a third subclass, Penny alleged that San Dimas automatically deducted 30 minutes from their hours for meal times irrespective of the length of the break.
6. Pay Stub Violations: Penny alleged that San Dimas failed to provide AWS employees pay stubs that included all legally required information.

In support of her motion for class certification, Penny filed a declaration from herself and three declarations from counsel, excerpts of Penny's deposition and of the depositions of three San Dimas representatives, and various documents, including San Dimas policies and forms as well as Penny's time cards and pay stubs.

Prior to the hearing on the class certification motion, the trial court issued a single sentence tentative ruling stating: "The motion is denied." When asked by plaintiff's counsel at the hearing if there was a particular area the court felt plaintiff failed to establish for class certification, the court responded: "[W]here you lack substance with regard to your motion is the lack of evidence. There's pretty much only your client's statements with regard to her belief that she, you know, her experience is representative of similar issues involving other class members. There's no corroboration for that with regard to other class members. She doesn't know any employees. She's just kind of expressing what she considers to be her best guess that there are other employees. There have to be. And so with regard to the opposition, the court generally must concur that it does not find that there's any credible evidence of common issues that involve other employees. There's just plaintiff's attempt to try to be the standard bearer as to issues as

to which she's not even able to substantiate by way of statements of other employees with regard to similar issues. And with regard to her [six] classes, with regard to whether or not her case is truly representative of a class, with a class, appears to lack substance and appears to be her singular attempt to try to marshal resources as if it were a class action where she's not able to establish *ab initio* that there is a class action." After argument by both sides, the court stated: "I'll look at your arguments again with regards to your statements here in open court. But initially I still feel that this is a case that lacks substantial corroborative evidence with regard to others having similar experiences other than your client. And it doesn't prevent your client from going forward on all the bases upon which your client feels she's been deprived of rights under the Labor Code. It just prevents you from going forward as a class action as to which you haven't identified one other employee, other than your client, whom you feel is similarly situated, not one other employee, not any other employee."

The court then took the matter under submission. The minute order entered the day after the hearing stated "[t]he court adopts its tentative ruling, which is filed herein on July 12, 2011 and incorporated by reference as the final order of the court" and denied the class certification motion.

DISCUSSION

Penny contends that the trial court erred when it denied her motion for class certification. Specifically, Penny alleges that (1) the trial court denied class certification on the basis of improper legal criteria, and (2) substantial evidence did not support the trial court's conclusion that Penny failed to demonstrate that (a) other employees had similar experiences and (b) there were common issues involving other employees. We disagree as to all proposed classes except the pay stub violations class. Although the class action often will be a superior device for wage and hour claims (*Gentry v. Superior Court* (2007) 42 Cal.4th 443; see also *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340), [n]ot all overtime cases will necessarily lend themselves to class actions." (*Gentry, supra*, 42 Cal.4th at p. 462.) Here, the trial court acted within its

discretion to deny class certification based on the lack of evidence as to five of the six proposed classes.

I. Standard of Review

A ruling on class certification is reviewed for abuse of discretion. (*Sav-On, supra*, 34 Cal.4th at p. 326.) “‘Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.’” (*Id.*; see Eisenberg, Horvitz & Wiener, Cal. Practice Guide, Civil Appeals & Writs (The Rutter Group 2011) § 8:98, p. 8–52.) “‘Any valid pertinent reason stated will be sufficient to uphold the [trial court’s] order.’” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.) Accordingly, a trial court ruling “‘supported by substantial evidence generally will not be disturbed “unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].”’” (*Sav-On, supra*, 34 Cal.4th at pp. 326-327, quoting *Linder, supra*, 23 Cal.4th at pp. 435–436.) However, “[w]e do not apply this deferential standard of review if the trial court has evaluated class certification using improper criteria or an incorrect legal analysis [Citations.] . . . The reviewing court ‘must examine the trial court’s reasons for denying class certification.’ [Citation.] When reviewing an order denying class certification, appellate courts ‘consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial.’ [Citation.]” (*Jaimez v. DAIOWS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1297-1298; *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 658.) Here, while the trial court did not specify which requirements for class certification Penny failed to meet, the reasons the trial court gave address the requirements for numerosity, commonality and typicality. The reasons given by the trial court did not address, and therefore we ignore on appeal, the requirements for ascertainability and adequacy of representation even if they might support denial of class certification.

II. Improper Legal Criteria

Penny contends that the trial court applied improper legal criteria in denying her motion for class certification. Specifically, Penny argues that the trial court erred in

concluding that “Penny failed to present ‘substantial corroborative evidence with regard to others having similar experiences other than [herself]’” because a class certification motion may be supported by a single employee declaration, citing *Sav-On, supra*, 34 Cal.4th 319. As Penny notes, the Supreme Court in *Sav-On* rejected an employer’s argument that a single declaration does not support class treatment, stating that: “[e]vidence of even one credible witness ‘is sufficient proof of any fact.’” (*Sav-On, supra*, 34 Cal.4th at p. 334; see *Keller v. Tuesday Morning, Inc.* (2009) 179 Cal.App.4th 1389, 1399.) Thus, Penny concludes, “the trial court was incorrect in assuming that Ms. Penny was required to submit additional declarations to certify the class.”

We disagree and do not find that the trial court applied improper legal criteria. While Penny is correct that proper legal criteria allows evidence from one credible witness as sufficient proof of any fact, including facts necessary for class certification, significantly the trial court here did not find Penny’s evidence to be credible. Specifically, the trial court stated it did “not find . . . any credible evidence of common issues that involve other employees” and that the court believed Penny was “just kind of expressing what she considers to be her best guess that there are other employees” with similar issues but Penny didn’t “know any employees.” The weight and credibility of the evidence are matters within the trial court’s discretion. (*Sav-On, supra*, 34 Cal.4th at p. 334.) Accordingly, it was within the trial court’s discretion to find Penny’s declaration to be insufficient proof to support class certification and it was therefore not improper legal criteria for the trial court to state that corroborative evidence in addition to Penny’s declaration was needed.

III. Substantial Evidence

Having determined that the trial court did not apply improper legal criteria, we apply a deferential standard of review and will not disturb a trial court’s class certification ruling supported by substantial evidence. (*Sav-On, supra*, 34 Cal.4th at pp. 326–327.) Where ““a certification order turns on inferences to be drawn from the facts, ““the reviewing court has no authority to substitute its decision for that of the trial

court.”””” (Sav-On, *supra*, 34 Cal.4th at p. 328; *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1287.)

In order to establish a “well-defined community of interests,” a plaintiff seeking certification must demonstrate, by a preponderance of the evidence, the presence of: “(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.) With regard to the first prong of the test, the moving party’s burden is not “merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues predominate.” (*Id.* at p. 1108.) The proper standard of review “is not whether substantial evidence might have supported an order granting the motion for class certification, but whether substantial evidence supported the trial court’s conclusion that common questions of law or fact did not predominate over individual issues.” (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 940-941.) Here, we conclude that the trial court did not abuse its discretion in denying Penny’s motion for class certification as to the overtime class, regular rate class, failure to pay all wages class, waiting time class and missed meal periods class. The trial court did abuse its discretion in denying class certification of the pay stub violations class.

Preliminarily, we note that Penny addresses the trial court’s denial as being based on the conclusion that her experiences were not similar or typical of other employees. As Penny states, “[t]he typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues.” (*Medraza v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99; see Weil & Brown, Cal. Practice Guide, Civil Procedure Before Trial (The Rutter Group 2012) § 14:28, p. 8–52 [“The purported class representative’s claim must be ‘typical’ but not necessarily identical to the claims of other class members. It is sufficient that the representative is *similarly situated* so that he or she will have the *motive to litigate* on behalf of all class members. [Citation.]”].) We read the trial court’s denial as being based not solely on a determination that there was a lack of typicality, but also a lack of common issues of fact

and numerosity. The trial court stated that it “generally must concur [with the opposition] that it does not find that there’s any credible evidence of common issues that involve other employees. There’s just plaintiff’s attempt to try to be the standard bearer as to issues as to which she’s not even able to substantiate by way of statements of other employees with regard to similar issues.”

In any event, in support of her contention that Penny’s claims were typical of the proposed classes, Penny cites to a list of 11 “uniform practices and policies” San Dimas subjected employees to which was the same list of 11 “common facts” Penny cited earlier in the brief when discussing whether common questions of law or fact predominate. Those lists appear to summarize points made earlier in the brief.

We now turn to the record to review the evidence.

A. Overtime Class

Penny sought certification of AWS employees who worked in excess of three 12-hour shifts but were not paid double time for the excess hours, as well as for subclasses of AWS employees who San Dimas did not pay a proper premium for working over the agreed schedule and who San Dimas did not pay a short shift penalty or overtime for working more than 8 hours but less than the agreed schedule.

On appeal, Penny argues that her “time records reveal that she rarely, if ever, worked [three] 12-hour shifts as established by the AWS. Rather she usually exceeded the schedule on a weekly basis.” But when Penny worked overtime hours, San Dimas did not pay double time for excess hours. Penny argues that San Dimas did not classify on-call and education time as hours worked. Penny also argues that San Dimas sent nurses home early once a week.

In her deposition, Penny stated that she did not know of any employee who worked more than his or her scheduled shift or who worked less than his or her scheduled shift. Penny also stated in her deposition that she did not know if any other San Dimas employees were entitled to receive overtime pay but did not, entitled to receive double time but did not, had their overtime pay calculated incorrectly, or was not paid all wages owed to them. The only time records in evidence were for Penny. Although Penny

stated at her deposition that nurses were sent home early once a week, there is no indication whether these other employees were sent home after working more than 8 hours and less than 12 hours. Likewise, there is no evidence of other employees being placed on-call or attending education programs.

“Presuming in favor of the [denial of] . . . certification, as we must, the existence of every fact the trial court could reasonably deduce from the record” (see *Sav-On, supra*, 34 Cal.4th at p. 329; *People v. Johnson* (1980) 26 Cal.3d 557, 576), “we cannot say it would be irrational for a court to conclude” that Penny failed to demonstrate numerosity, typicality, and that common issues of fact predominate on the overtime claim. The trial court acted within its discretion to deny certification of the overtime class.

B. Regular Rate Class

Penny sought class certification of AWS employees for whom she claims San Dimas miscalculated their regular rate of pay by failing to include nondiscretionary bonuses, charge nurse premium, shift differentials, holiday premium and weekend premium. In addition, Penny sought certification of a subclass of AWS employees who San Dimas paid less than the regular rate of pay for missed meal or missed rest period penalties.

On appeal, Penny argues that San Dimas did not pay a short shift differential in the rate of pay for missed meal periods during a short shift, admitted that regular rate is the employee’s base rate plus includable pay such as shift differential, admitted that regular rate of pay is automatically calculated by its accounting system, and that it maintained a record of paying employees for missed meals which confirms payment at base rather than regular rate.

A short-shift differential is paid “where an employee does not work a full 12-hour shift and, as a result, receives extra pay for the time worked” while a shift differential is “additional pay due to the nature of the work, such as working a nightshift or performing undesirable tasks.” (*Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 905.) The deposition excerpts cited by Penny do not refer to short-shift differential but a shift differential. Furthermore, there was no evidence that any other

employee ever missed a rest break. Penny stated that she did not know if San Dimas failed to provide rest breaks for other employees. Under its policies, San Dimas made 10-minute rest breaks available after every four hours worked and employees were directed to fill out a form to be paid for missed rest breaks. While there is a record showing payments made by San Dimas for missed meals, the document does not indicate the rate of pay being used. Likewise, Penny does not cite to any evidence or occasions where another employee was entitled to a regular rate of pay higher than his or her base rate and did not receive it.

Accordingly, the trial court did not abuse its discretion in denying certification of the regular rate class for failing to meet the numerosity, commonality and typicality requirements.

C. Failure to Pay All Wages Class

Penny sought class certification of AWS employees who she alleges San Dimas failed to pay all wages due to them for overtime, double overtime, missed meal period and missed rest breaks. As a subclass, Penny sought certification for AWS employees who were not paid minimum wage for on-call or standby status.

On appeal, Penny argues that San Dimas utilized a uniform “‘Stand-By and Call Back Compensation Policy’” and a uniform “‘On Call Policy.’” The policies state that employees shall receive compensation for their on-call time at prescribed rates that are on a sliding scale and below minimum wage.

As discussed above and below, the trial court did not abuse its discretion in denying certification of the overtime and missed meal period classes and to the extent the claims in the failure to pay all wages class overlaps with these other classes the trial court’s denial is affirmed. As to the on-call and standby subclass, Penny does not cite to any evidence of other employees being placed on standby or on-call. The only time records are for Penny. Accordingly, the trial court did not abuse its discretion by denying class certification for this subclass, based on failure to meet the numerosity, commonality and typicality requirements.

D. Waiting Time Class

Penny also sought class certification of AWS employees who left San Dimas's employ but were not paid all wages due upon termination.

On appeal, Penny argues that to the extent San Dimas failed to pay employees all wages due during their employment, then necessarily San Dimas failed to pay employees all wages due upon termination. She also argues that she did not receive her last paycheck in a timely manner.

In her deposition, Penny stated that no San Dimas employee has ever told her that he or she believes his or her final paycheck was inaccurate and had no idea if any employee who separated from San Dimas did not timely receive a final paycheck. Because there are no paystubs or declarations from other AWS employees claiming their last paycheck was untimely, or evidence based on hospital policy or Persons Most Qualified depositions, the trial court did not abuse its discretion in declining to certify the waiting time class due to plaintiff's failure to make a sufficient showing as to commonality, typicality and numerosity.

E. Missed Meal Period Class

Penny sought class certification for AWS employees who San Dimas failed to provide legally compliant meal periods. In addition, she sought class certification for subclasses of AWS employees who signed a second meal waiver as a condition of employment, who signed second meal waivers and worked more than 12 hours a shift, and who had 30 minutes deducted from their hours even if their meal times were shorter.

On appeal, Penny argues that San Dimas had a single meal break policy applicable to all hourly employees and required AWS employees to sign a second meal waiver as a condition of employment. Penny also argues that San Dimas's time-keeping system did not permit employees to clock back in from lunch for 30 minutes and that Penny regularly had her meal period interrupted.

During her deposition, Penny admitted that she had no idea whether any other San Dimas employee missed their meal period or was ever called back early from a meal period, or was not paid for a missed meal. Also in her deposition, Penny stated that she

did not know of any employee who worked more than his or her scheduled shift. Because the only declaration and time records are from Penny, there was no substantial evidence below from any source that other employees had their meal periods interrupted, signed the meal waiver but worked more than 12 hours in a shift or were called back early from their meal periods but had 30 minutes deducted from their hours.

Moreover, under its policies, San Dimas made an uninterrupted 30-minute meal period available after more than five hours worked and directed employees to fill out a form to be paid for missed meal periods. The evidence from a San Dimas representative showed that, although no AWS employee had ever declined to sign the second meal waiver, “it’s their choice if they want to take it or waive it.” Presuming as we must the existence of every fact that can be deduced from the record (*Sav-On, supra*, 34 Cal.4th at p. 329), we cannot say that it was an abuse of discretion for the trial court to find that Penny failed to produce substantial evidence that, for other AWS employees other than Penny, San Dimas failed to provide uninterrupted meal breaks, required signature of waivers, or improperly deducted 30 minutes for shorter meal breaks.

Accordingly, the trial court did not abuse its discretion in denying certification of the missed meal period class and subclasses for failing to meet the numerosity, commonality and typicality requirements.

F. Pay Stub Violations Class

Last, Penny sought class certification for AWS employees based on the pay stubs not including all legally required information.

On appeal, Penny argues that San Dimas employees received a pay stub with the same general information on it, citing as evidence the deposition excerpt of a San Dimas representative. Penny argues that her own pay stub shows San Dimas’s failure to identify the total hours worked and the rate of pay.

Labor Code section 226 requires every employer to “furnish each of his or her employees, . . . , an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, . . . , and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each

hourly rate by the employee.” (Lab. Code, § 226, subd. (a).) The Labor Code also provides that “An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney’s fees.” ((Lab. Code, § 226, subd. (e).)

Accordingly, Penny presented evidence that the pay stub she received did not provide all information required by Labor Code section 226 and she presented evidence that San Dimas provided other employees paystubs lacking the same required information. Additionally, damages may be awarded per violation by statute. We therefore find that the trial court abused its discretion in denying certification of the pay stub violations class.

DISPOSITION

The order is affirmed in part, and reversed in part. The order is affirmed as to the denial of class certification for the overtime class, regular rate class, failure to pay all wages class, waiting time class and missed meal periods class, as well as all proposed subclasses within these classes. The order is reversed as to the pay stub violations class. Costs awarded to the appellant.

NOT TO BE PUBLISHED.

CHANAY, J.

We concur:

ROTHSCHILD, Acting P.J.

JOHNSON, J.